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No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN ELECTRIC POWER COMPANY, INC., *et al.*,
Petitioners,

v.

KENTUCKY PUBLIC SERVICE COMMISSION, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

A. JOSEPH DOWD
JOHN R. BURTON
KEVIN F. DUFFY
AMERICAN ELECTRIC POWER
SERVICE CORPORATION
1 Riverside Plaza
Columbus, Ohio 43215
(614) 223-1000

REX E. LEE*
DAVID W. CARPENTER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

LIVELY M. WILSON
BRUCE F. CLARK
STITES & HARBISON
600 West Main Street
Louisville, Kentucky 40202
(502) 587-3400

* *Counsel of Record*

Pandick Midwest, Inc., Chicago • 733-6000

QUESTION PRESENTED

Whether the abstention doctrines of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), or *Younger* v. *Harris*, 401 U.S. 37 (1971), can prevent a federal district court from adjudicating a claim that a federal statute (like the Federal Power Act) vests exclusive jurisdiction over certain matters in a federal agency (like FERC) and preempts a state utility commission from making its own separate determinations of those matters and preferring its state's interests to those of other states, contrary to the federal regulatory scheme?

STATEMENT REQUIRED BY RULE 28.1

Petitioners Kentucky Power Company, Appalachian Power Company, Columbus and Southern Ohio Electric Company, Indiana & Michigan Electric Company, Ohio Power Company, and AEP Generating Company are each subsidiaries of petitioner American Electric Power Company, Inc. American Electric Power Company, Inc. has no parent company. American Electric Power Company, Inc. has no other subsidiaries that are not wholly-owned.

PARTIES BELOW

The Plaintiffs-Appellants in the District Court and the Court of Appeals were: American Electric Power Company, Inc., Kentucky Power Company, Appalachian Power Company, Columbus and Southern Ohio Electric Company, Indiana & Michigan Electric Company, Ohio Power Company, and AEP Generating Company.

The Defendants-Appellees and the intervenors who supported them were: Kentucky Public Service Commission; Richard D. Heman, Chairman of the Kentucky Public Service Commission; Laura Murrell and Rush Dozier, Members of the Kentucky Public Service Commission; David L. Armstrong, Attorney General, Commonwealth of Kentucky; Air Products and Chemicals, Inc.; Armco Inc.; Ashland Oil, Inc.; Huntington Alloys, Inc.; Kentucky Electric Steel Company; Pickands Mather & Co.; John Henry Ward; Bert Diamond; Sada Crum; and Concerned Citizens of Martin County, Inc.

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OPINIONS BELOW

The opinion of the Court of Appeals (Appendix ("App.") 1a-12a) and the order denying FERC's and petitioners' motion to publish the opinion (App. 14a) are each unpublished. The opinion of the District Court (App. 15a-23a) is unpublished.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on March 24, 1986. App. 1a-12a. A timely petition for rehearing was denied on May 6, 1986. App. 13a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents a question that, over the past four years, has become one of the most widely litigated and widely controverted in the federal system: whether abstention principles prohibit a federal district court from adjudicating a claim that a federal statute (like the Federal Power Act) vests exclusive jurisdiction over certain matters in a federal regulatory agency (like the Federal Energy Regulatory Commission ("FERC")) and preempts a state utility commission from making its own determination. The Sixth Circuit's holding on this abstention issue squarely conflicts with the decisions of the Third, Fifth, Eighth, Ninth, Eleventh, and District of Columbia Circuits. Only one decision of the Fourth Circuit is consistent with the Sixth Circuit's holding in this case. Accordingly, eight circuits are involved in the conflict.

The importance of review of these questions is greatly accentuated because, late last term, this Court held that the Federal Power Act does preempt state regulatory commissions from exercising jurisdiction over matters covered by FERC wholesale rate schedules; at the same time, this Court's decision explicitly left a number of questions unanswered. *See Nantahala Power & Light Co.* v. *Thornburg*, 54 U.S.L.W. 4676, 4681 (June 17, 1986). The conflict in the courts of appeals on the abstention issues is thus impeding the development of substantive federal law. This case demonstrates how the unresolved conflict can subvert the central purposes of the Federal Power Act by enhancing the ability of states to seek to prefer their parochial interests at the expense of their neighbors.

Factual Background. This case is typical of the many recent cases that have presented these federal abstention issues. A state utility commission (the Kentucky Public Service Commission) has refused to give effect to the governing FERC rate schedules in setting retail rates. Instead, it has sought to redetermine matters that petitioners claim to be subject to FERC's exclusive jurisdiction — the allocation of low-cost

power supplies and interstate transmission costs among affiliated utilities serving different states — and to force an interstate power pool to subsidize Kentucky's citizens. Petitioners, in turn, sought a federal court order that would prevent this interference with the federal regulatory scheme and protect the financial integrity of the interstate power pool — only to be met with a contention that a federal court may not adjudicate these federal claims.

Petitioners are five operating electric utilities that sell electricity to customers in seven different states (Kentucky, Virginia, Tennessee, West Virginia, Ohio, Indiana, and Michigan), their parent company (American Electric Power Company, Inc. ("AEP")), and an affiliate (AEP Generating Company). Kentucky Power Company is the AEP subsidiary that serves Kentucky.

Each of these AEP operating electric utilities has its own generating capacity. Their facilities, however, are interconnected by extra high voltage transmission lines to form the "AEP Power Pool." This pooling of power permits AEP companies to achieve economies of scale and to coordinate the construction and operation of generating and transmission facilities, enhance reliability, and assure that each operating company can supply power to its retail customers at lower unit costs. These power supply allocation and transmission arrangements are governed by contracts among the AEP member companies, each of which has been filed with, and accepted by, FERC as a rate schedule.

This case arose because the Kentucky Public Service Commission refused to give effect to FERC rate schedules in setting Kentucky Power's retail rates, in two respects.

First, Kentucky Power is subject to a Unit Power Agreement, which FERC accepted as a rate schedule and which became effective, subject to refund, on December 10, 1984. *See AEP Generating Co.*, 29 FERC (CCH) ¶ 61,002 (1984). This FERC rate schedule obligates Kentucky Power to purchase

15% of the output of a coal-fired plant ("Rockport Unit 1") that is jointly owned by petitioners AEP Generating Company and Indiana & Michigan Electric Company. Kentucky Power entered into this agreement because it had not added new capacity to the Power Pool since 1969, and its generating capacity has been insufficient for many years to meet the demand of Kentucky Power's customers and a prudent reserve.[1] While the power from recently-constructed plants like Rockport Unit 1 is unavoidably more expensive than the power from preexisting AEP company facilities (which were built when costs were lower), the Rockport Unit 1 power is far less expensive than is the power from plants of other utilities that came on line during this same period.[2]

The Kentucky Public Service Commission refused to recognize the costs incurred under the Unit Power Agreement in establishing Kentucky Power's retail revenue requirements and retail rates. Instead, the Kentucky Commission set rates "as if" Kentucky Power had purchased the required additional capacity from the AEP Power Pool at a cost of about $240 per kw (as opposed to the some $855 per kw capacity cost of the Rockport Unit 1 power). The Kentucky Commission justified its action

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[1] It is essential to the successful operation of the AEP Power Pool that each of the operating companies acquires additional generating capacity when it becomes clear that its customers' demand for power will chronically exceed that company's own generation. In Kentucky Power's view, Sections .5, .6 and 5.7(ii) of a second FERC rate schedule (the AEP System Interconnection Agreement) impose this obligation on each member company. *See* p. 5 n.3, *infra.*

[2] Rockport Unit 1 has capacity costs of about $855 per kilowatt (kw). The capacity costs of coal-fired generating units of other utilities that have come on line during this period have generally ranged from about $1,250 per kw to $1,500 per kw. The average embedded capacity charges for power from existing AEP plants is about $320 per kw. The average embedded capacity charges are lower because they reflect costs of electric generation facilities constructed during earlier periods when construction costs were substantially lower.

by (1) "construing" a second FERC rate schedule that applies to the AEP companies (the AEP System Interconnection Agreement) to give Kentucky Power the option of obtaining power from the pool and (2) finding that Kentucky Power had been "imprudent" in acquiring new capacity from Rockport Unit 1 instead of exercising its supposed "option" to continue to buy power from the pool. The Kentucky Commission took this action despite the fact that the Unit Power Agreement is the "filed rate" and that, in Kentucky Power's view, the System Interconnection Agreement had required Kentucky Power to enter into that Unit Power Agreement.[3] *See* p. 4 n.1, *supra*. In any event, FERC has exclusive jurisdiction to construe the System Interconnection Agreement and to allocate low-cost and higher-cost power supplies among the AEP companies.

The result of the Kentucky Commission's order is that Kentucky Power is obligated by the FERC rate schedule to incur $23 million in costs each year that now cannot be recouped through its retail rates. But these "trapped costs" (*see Nantahala Power & Light Co.* v. *Thornburg*, 54 U.S.L.W. at 4681) are not the only adverse consequences of the Kentucky order. The Kentucky Commission order is an attempt to use its

[3] Indeed, after the Kentucky Commission issued its order, Kentucky Power filed a petition with FERC seeking a declaratory ruling that confirms that Kentucky Power is required to obtain this alternative power source and does not have the option of chronically draining power away from the pool. FERC has exercised jurisdiction over this matter, in a proceeding in which the Kentucky Commission and other respondents are parties. *Kentucky Power Co.*, FERC Docket EL86-10-000. FERC has said that its decision on this issue will bind the state commissions. *AEP Generating Company*, 32 FERC (CCH) ¶61,364, at 61,821 (1985). A decision by FERC is expected shortly.

jurisdiction over retail rates to shift the relatively higher costs of Rockport Unit 1 power to customers in other states, contrary to FERC's jurisdiction. *Id.*[4]

Second, the Kentucky Commission also refused to give effect to the terms of a second FERC rate schedule: the AEP Transmission Agreement which reallocates the costs of the AEP extra-high voltage transmission lines among the AEP pool members based upon their relative demand on the system, instead of the geographical method which had previously applied. Under the Transmission Agreement, the transition to the new system of cost allocation is phased in over a five-year period. However, the Kentucky Commission refused to recognize the phased-in nature of the Agreement. This Commission's ruling will have the effect of creating an additional $24 million in "trapped costs" over the five years. A federal court has entered an injunction requiring another state utility commission to give full effect to this same AEP Transmission Agreement in setting retail rates. *See Appalachian Power Co.* v. *Public Service Comm'n of West Virginia*, 614 F. Supp. 64 (S.D.W. Va.) (preliminary injunction), *aff'd*, 770 F.2d 159 (4th Cir. 1985), *on remand*, 630 F. Supp. 656 (S.D.W. Va. 1986) (permanent injunction).

Proceedings in the Lower Courts. Petitioners filed this suit in federal district court on December 12, 1984, eight days after the Kentucky Commission entered its order and two days after the Unit Power Agreement became effective. Petitioners contended that both the Federal Power Act and the Commerce Clause required the Kentucky Commission to give effect to the

[4] Under the Kentucky order, Kentucky Power is assumed to be entitled to purchase power at a cost of about $240 per kw when the average embedded cost of capacity from the AEP companies is about $320 per kw and when member companies are adding new power to the pool at a cost of about $855 per kw. The Kentucky Commission pointed to no other source of power outside the AEP system available to Kentucky Power (and indeed there is none) which would cost less than the $855 per kw.

Unit Power Agreement and Transmission Agreement unless and until modified by FERC and to respect FERC's exclusive jurisdiction over these arrangements. Petitioners sought a preliminary injunction that would permit the immediate recovery of the $23 million in "trapped" annual Unit Power Costs and thereby preserve the financial stability of the AEP Power Pool and its members. In light of the urgent need for relief, petitioners requested, and the District Court granted, expedition on the motion for preliminary injunction, with a hearing occurring on December 18, 1984.

Less than one month later, on January 16, 1985, the District Court held that it had jurisdiction under 28 U.S.C. § 1331 and that the Johnson Act (28 U.S.C. § 1342) authorized this action (App. 18a-19a), but dismissed the complaint on two related abstention grounds. First, it noted that Kentucky Power had subsequently appealed the Kentucky Commission order to a Kentucky state court.[5] Because Kentucky Power could raise its federal claims in that then-ongoing state appeal, the District Court held that it was required to abstain under the doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971). App. 19a-20a. Second, the District Court held that abstention was independently required by the doctrine of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), because the federal action could interfere with Kentucky's "overriding interest in regulating the retail rates charged by public utilities." App. 21a-23a.

A divided Sixth Circuit affirmed. First, the court held, with

[5] Because it had been unclear whether the District Court would assert jurisdiction over the matter, Kentucky Power filed a petition in the Kentucky state court for review of the Kentucky Commission order, on December 20, 1984, eight days after the federal suit was filed. Kentucky law requires such appeals to be filed within 20 days of the final commission order. This state proceeding is limited to the administrative record, and the six other AEP company petitioners are not parties to this state appeal.

Judge DeMascio disagreeing (App. 10a-12a), that the doctrine of *Younger* v. *Harris* required abstention. App. 6a-7a. Second, while the *per curiam* decision stated that abstention is not required by *Burford* (App. 4a-6a), two of the three judges on the panel separately stated that *Burford*, too, required abstention. App. 7a-10a & 10a-12a. Thus, the Sixth Circuit voted two to one in favor of abstention on each theory.

REASONS FOR GRANTING THE WRIT

The question whether abstention principles deprive federal district courts of authority to prevent state utility commissions from interfering with the exclusive jurisdiction of FERC (or other federal agencies) has become one of the most important and frequently recurring questions facing the federal judiciary. When the question was presented to the Court three terms ago in *Aluminum Company of America* v. *Utilities Comm'n of North Carolina*, 713 F.2d 1024 (4th Cir. 1983) ("*Alcoa*"),[6] only the Fourth Circuit had squarely addressed this issue. This Court denied Alcoa's petition for certiorari, with Justices Brennan and White noting that they would have granted the petition. 465 U.S. 1052 (1984). In the intervening three years, litigation of these questions has exploded. Four circuits have addressed these abstention issues in cases presenting the same Federal Power Act (or Natural Gas Act)[7] preemption claims raised in

[6] There, Alcoa had sought to litigate in federal district court the identical factual and legal claims under the Federal Power Act that this Court subsequently decided in *Nantahala Power & Light Co.* v. *Thornburg*, 54 U.S.L.W. 4676 (June 17, 1986).

[7] This Court has stated many times that the "relevant provisions of [the Natural Gas Act and the Federal Power Act] 'are in all material respects substantially identical' " and that it is the Court's "established practice" to "cit[e] interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981) (citations omitted).

this case and in *Alcoa.*[8] In addition, other circuits have since addressed the issues in other closely related contexts.[9] The Sixth Circuit's abstention decision conflicts with each of these intervening court of appeals' decisions, as well as with the pertinent decisions of this Court. Ironically, the only court of appeals' decision that agrees with the Sixth Circuit is the decision that the Sixth Circuit's *per curiam* opinion (App. 4a-6a) purports to *disagree* with: the Fourth Circuit decision in *Alcoa.* Thus in three years, the conflict has spread to eight circuits, with six favoring the petitioners' view, and two opposed.

1. This Court's holdings reject the Sixth Circuit's ruling in this case. This Court has held that a federal court may not exercise "judicial discretion to dismiss a suit merely because a State court could entertain it" and that a federal court can abstain from "adjudicat[ing] a controversy properly before it . . . only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800, 813-14 (1976).

This Court's holdings teach that state courts simply cannot have an overriding interest in adjudicating the question whether Congress has conferred exclusive jurisdiction over certain mat-

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[8] *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n,* 791 F.2d 1111 (3rd Cir. 1986) (Natural Gas Act); *New Orleans Public Service, Inc.* v. *New Orleans,* 782 F.2d 1236 (5th Cir. 1986) (Federal Power Act); *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n,* 772 F.2d 404 (8th Cir. 1985) (Federal Power Act); *Appalachian Power Co.* v. *Public Service Comm'n of West Virginia,* 770 F.2d 159 (4th Cir. 1985), *affirming* 614 F.Supp. 64 (S.D.W. Va.) (Federal Power Act).

[9] *South Central Bell Tel. Co.* v. *Louisiana Pub. Service Comm'n,* 744 F.2d 1107, 1123 (5th Cir. 1984), *vacated on other grounds,* 54 U.S.L.W. 4505 (May 27, 1986); *Champion Int'l Corp.* v. *Brown,* 731 F.2d 1406 (9th Cir. 1984); *Family Division Trial Lawyers* v. *Moultrie,* 725 F.2d 695 (D.C. Cir. 1984); *Baggett* v. *Dept. of Professional Regulation,* 717 F.2d 521 (11th Cir. 1983).

ters in a federal regulatory agency and has therefore preempted contrary state action. This Court has repeatedly upheld the authority of federal courts to enjoin state utility commission action on the same basic preemption grounds presented here and rejected arguments that state remedies must be exhausted — without even addressing whether abstention was required or permitted. *See, e.g., Public Utilities Comm'n of California* v. *United States,* 355 U.S. 534, 540 (1958); *Public Utilities Comm'n of Ohio* v. *United Fuel Gas Co.,* 317 U.S. 456 (1943).

These principles apply with special force in cases presenting federal preemption claims under the Federal Power Act. The Act establishes a federal tribunal (FERC) to referee disputes among states on how low-cost and high-cost electric power supplies are allocated among them. The purposes of the Act would be frustrated if individual states could act on their own incentives and disrupt the interstate supply of power by adopting allocations that prefer their interests to those of neighboring states, contrary to FERC's regulation. *See Nantahala Power & Light Co.* v. *Thornburg,* 54 U.S.L.W. 4676 (June 17, 1986); p. 9 n.8, *supra* (and cases cited). Unless federal district courts have jurisdiction to enforce the now-established federal rights under the filed rate doctrine, states can thwart the federal regulatory scheme and subvert interstate power supply arrangements adopted thereunder. Supreme Court review of final judgments of the highest courts in states cannot realistically provide effective relief — as FERC recognizes. *See* p. 15, *infra.*

For these same reasons, the Third, Fifth, Eighth, Ninth, Eleventh, and District of Columbia Circuits have rejected each of the separate grounds upon which the Sixth Circuit ordered abstention in this case.

2. Under the doctrine of *Younger* v. *Harris,* a federal district court cannot enjoin an ongoing state judicial or quasi-judicial enforcement proceeding that implicates important state

interests when there is an adequate opportunity in the state proceeding to raise the federal claim. *See Middlesex County Ethics Committee* v. *Garden State Bar Ass'n,* 457 U.S. 423 (1982). Other than the Sixth Circuit in this case and the Fourth Circuit in *Alcoa,* federal courts of appeals have uniformly held that there is no basis for *Younger* abstention in a case like the present one, for two related reasons.

First, other courts of appeals have held, contrary to the Sixth Circuit, that *Younger* is inapplicable where, as in this case, the federal plaintiff is not the defendant in a state criminal prosecution or civil enforcement proceeding and is not seeking to enjoin a state proceeding.[10] Here, a utility is merely prosecuting a parallel state rate proceeding and appeal that the utility itself initiated. As the Third Circuit recently held, "[t]o deny [utility claimants] access to a federal forum simply because of their pending state appeal would be at odds with a fundamental premise of our federal judicial system: that is, 'that where Congress has granted concurrent jurisdiction, a plaintiff is free to bring suit in both the state and federal forums for the same cause of action.'" *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n,* 791 F.2d 1111, 1117 (3rd Cir. 1986) (citation omitted). *Accord, Colorado River Water Conservation District* v. *United States, supra,* 424 U.S. at 817.

Similarly, the District of Columbia Circuit reasons that there can be no *Younger* abstention when, as here, the state has not "brought the federal plaintiffs before its own courts to protect important policy and resource interests" and when, as here, the federal plaintiff has not sought to "divert or circumvent state court adjudication." *Family Division Trial Lawyers* v.

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[10] This Court's recent decision in *Ohio Civil Rights Commission* v. *Dayton Christian Schools, Inc.,* 54 U.S.L.W. 4860 (June 27, 1986), makes it explicit that *Younger* abstention was possible there only because it involved a suit to enjoin a state enforcement proceeding and because (in contrast to the present case) Congress had not conferred exclusive jurisdiction on a federal agency over the matters at issue in the state proceeding.

Moultrie, 725 F.2d 695, 702 (D.C. Cir. 1984). These considerations have special force here, because federal claims were raised in the state proceeding only because of uncertainty over the availability of the federal forum. *Compare* p. 7 n.5, *supra, with Kentucky West Virginia Gas Co., supra,* 791 F.2d at 1117.

Second, *Younger* abstention is proper only if the state proceeding implicates "important state interests." *Middlesex County Ethics Committee* v. *Garden State Bar Ass'n, supra,* 457 U.S. at 432. Contrary to the Sixth Circuit holding, other courts of appeals hold that this state interest in regulating retail rates, however important, cannot give the state an "overriding interest" in adjudicating federal preemption claims that go to "the power of the state administrative agency to proceed at all;" "no deference is due state proceedings which would entrench upon the exclusive federal domain." *Baggett* v. *Department of Professional Regulation,* 717 F.2d 521, 524 (11th Cir. 1983).

Thus, three courts of appeals have now held that *Younger* abstention is improper in suits raising the precise Federal Power Act and Commerce Clause preemption claims at issue here. They reason that the "legitimate state interest contemplated by *Younger* ... does not exist when the state action has been preempted or foreclosed" by a federal statute, *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n,* 772 F.2d 404, 417 (8th Cir. 1985), and that the "notion of 'comity' embodied by the *Younger* doctrine is 'not strained when a federal court cuts off state proceedings that entrench upon the federal domain.' " *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n,* 791 F.2d 1111, 1117 (3rd Cir. 1986) (citations omitted); *accord, Appalachian Power Co.* v. *Public Service Comm'n of West Virginia,* 614 F. Supp. 64, 70-71 (S.D. W. Va.)., *aff'd,* 770 F.2d 159 (4th Cir. 1985). *See also Champion Int'l Corp.* v. *Brown,* 731 F.2d 1406, 1409 (9th Cir. 1984).

3. The abstention doctrine of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), is an even narrower exception to the duty of federal courts to adjudicate claims properly before it. It applies only where "difficult questions of state law" are presented and "federal review . . . would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation District* v. *United States, supra*, 424 U.S. at 814. Numerous courts of appeals have disagreed with the majority of the Sixth Circuit panel in this case and with the Fourth Circuit in *Alcoa*. They hold that *Burford* cannot permit abstention in a case like this one where *no* state law issues are presented and the only issue is whether federal law preempted the state agency from deciding a matter at all. The Third, Fifth, and Eighth Circuits have so held in cases presenting the very Federal Power Act (or Natural Gas Act) preemption claims at issue here.

These courts of appeals reason that when "Congress has created a statutory scheme . . . which arguably preempts the local regulation complained of," the federal preemption claim is "in no way dependent on local factors or local expertise for their resolution" and there is no basis for *Burford* abstention. *New Orleans Public Service, Inc.* v. *New Orleans*, 782 F.2d 1236, 1243 (5th Cir. 1986)(citations omitted);[11] *accord, Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utility Comm'n*, 791 F.2d 1111, 1115-16 (3rd Cir. 1986); *Middle*

[11] On June 10, 1986, four months after its decision in *New Orleans Public Service, Inc.* was announced, the Fifth Circuit, *sua sponte*, requested counsel in that case to submit letter briefs on the question whether its abstention ruling in that case should be vacated. This development further underscores the uncertainty in this area and the need for review by this Court.

South Energy, Inc. v. *Arkansas Public Service Comm'n,* 772 F.2d 404, 413 (8th Cir. 1985).[12]

Other courts have reached the identical results in cases arising under other federal statutes. *Baggett* v. *Department of Professional Regulation,* 717 F.2d 521, 524 (11th Cir. 1983); *South Central Bell Telephone Co.* v. *Louisiana Pub. Serv. Comm'n,* 744 F.2d 1107, 1123 (5th Cir. 1984), *vacated on other grounds,* 54 U.S.L.W. 4505 (May 27, 1986); *International Bhd. of Elec. Workers* v. *Public Service Comm'n,* 614 F.2d 206, 212 n.1 (9th Cir. 1980). They, too, hold that *Burford* abstention cannot be applied when there is a substantial federal preemption challenge to a state agency's jurisdiction.

The ultimate issue in this case is how the less expensive embedded costs and the more expensive Rockport Unit 1 costs are to be allocated among the affected companies and states. The Federal Power Act entitles petitioners to have that decision made by FERC rather than by one of the interested states and requires state commissions to give effect to filed rates. *Nantahala Power & Light Co.* v. *Thornburg, supra,* 54 U.S.L.W. 4676. Thus, the petitioners seek nothing more than their established rights under federal law. There is no state law issue. Neither this Court's precedents, common sense, nor deference to state courts where state law is involved, requires federal abstention in such a case. In any of at least six other circuits, the door of the federal courthouse would have been open to these petitioners. Such an important issue as the accessibility of federal courts to vindicate federal rights cannot depend on the fortuity of whether the supplicant and the courthouse are in Kentucky or Pennsylvania.

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[12] The Sixth Circuit's ruling is also inconsistent with the Johnson Act, 28 U.S.C. § 1342. Under the Sixth Circuit's holding, a federal court could never grant equitable relief in a federal challenge to a state order affecting rates. Yet the Johnson Act expressly authorizes such orders when the federal claim is based on Commerce Clause or federal preemption grounds. *Public Utilities Comm'n of Ohio* v. *United Fuel Gas Co.,* 317 U.S. 456 (1943).

4. The decision of these federal abstention issues by this Court at this time is a matter of the utmost importance. Indeed, FERC itself has recognized that federal court jurisdiction over challenges to state utility commission action under the filed rate doctrine is essential to the full implementation of the Federal Power Act. FERC participated in the court of appeals proceedings and successfully argued in favor of this position in both *Kentucky West Virginia Gas Co.* v. *Pennsylvania Public Utilities Commission*, 791 F.2d 1111 (3rd Cir. 1986), and *New Orleans Public Service, Inc.* v. *New Orleans*, 782 F.2d 1236 (5th Cir. 1986). For these reasons, after the Sixth Circuit issued its decision in this case, FERC wrote the Sixth Circuit a letter, noted that this decision presented a possibly certworthy issue, and requested that the Sixth Circuit publish its opinion. However, the Sixth Circuit has refused to do so. App. 14a.

The Sixth Circuit's response to FERC represents a further reason for review. It subverts the rule of law for a court of appeals to fail to publish decisions in a major case of first impression in that circuit, especially when it conflicts with the decisions of other courts of appeals and when a federal agency has requested that the opinion be published because it is considering participation in the case at the Supreme Court stage. This case thus affords the Court a rare opportunity to indicate the appropriate publication policies of federal courts of appeals. In all events, a court of appeals cannot be permitted to avoid Supreme Court review by hiding conflict-creating decisions in unpublished opinions.[13]

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[13] This is not the first time that the Sixth Circuit has declined to publish an opinion where the issue was one of first impression and important. *See Antalek* v. *Norfolk and Western Ry. Co.*, No. 84-3057 (6th Cir., Aug. 30, 1984, unpublished opinion). On May 5, 1986, this Court granted certiorari in *Atchison, Topeka and Santa Fe Ry. Co.* v. *Buell*, No. 85-1140, to review the identical issue involved in *Antalek*.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

A. JOSEPH DOWD
JOHN R. BURTON
KEVIN F. DUFFY
AMERICAN ELECTRIC POWER
SERVICE CORPORATION
1 Riverside Plaza
Columbus, Ohio 43215
(614) 223-1000

REX E. LEE*
DAVID W. CARPENTER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

LIVELY M. WILSON
BRUCE F. CLARK
STITES & HARBISON
600 West Main Street
Louisville, Kentucky 40202
(502) 587-3400

Dated: July 15, 1986

* *Counsel of Record*

APPENDIX

No. 85-5129

United States Court of Appeals

FOR THE SIXTH CIRCUIT

AMERICAN ELECTRIC POWER COMPANY, INC.; KENTUCKY POWER COMPANY; APPALACHIAN POWER COMPANY; COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY; INDIANA AND MICHIGAN ELECTRIC COMPANY; OHIO POWER COMPANY AND AEP GENERATING COMPANY,

Plaintiffs-Appellants,

v.

KENTUCKY PUBLIC SERVICE COMMISSION; RICHARD D. HEMAN, CHAIRMAN OF THE KY PUBLIC SERVICE COMMISSION; LAURA MURRELL, MEMBER OF THE KY PUBLIC COMMISSION; AND RUSH DOZIER, MEMBER OF THE KY PUBLIC SERVICE COMMISSION,

Defendants-Appellees,

AIR PRODUCTS AND CHEMICALS, INC., ARMCO, INC., ET AL. ATTORNEY GENERAL OF KENTUCKY, CONSUMER PROTECTION DIVISION, CONCERNED CITIZENS OF MARTIN COUNTY, INC., JOHN HENRY WARD, BERT DIAMOND AND SALLY CRUM,

Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

BEFORE: **JONES** and **CONTIE**, Circuit Judges; and **DEMASCIO**, District Judge.*

Per Curiam. This case raises the question whether it is proper for a federal court to dismiss on abstention grounds a challenge to a state public utility commission rate order brought

* Honorable Robert E. DeMascio, United States District Judge for the Eastern District of Michigan, sitting by designation.

by a utility alleging federal law claims, when the utility has simultaneously brought an attack on the same order raising the same claims in state court. The court below elected to dismiss citing both the *Younger* and *Buford* [sic] abstention doctrines. *See Younger v. Harris*, 401 U.S. 37 (1971), and *Burford v. Sun Oil*, 319 U.S. 315 (1943). We hold that *Burford* abstention is inappropriate in this circumstance but that *Younger* abstention is permissible and, accordingly, affirm.

I

The primary controversy raised in the complaint involves the source from which an electric company will be permitted to purchase wholesale electricity and pass along the cost of that purchase to its customers through retail rates.[1] Plaintiffs-appellants are American Electric Power Company, Inc. ("AEP"), a multi-state holding company of electric power utilities, and its subsidiaries. Kentucky Power Company ("KPC"), one of AEP's subsidiaries, provides electricity to retail customers in Kentucky. KPC is party to an Interconnection Agreement among AEP affiliates. This agreement creates a pool of electricity and permits an Agreement member to draw from this pool when its own power needs exceed capacity. KPC had, for some time, been drawing heavily from this pool. According to KPC, it was therefore obliged by the Interconnection Agreement to find a new source of wholesale electricity. Consequently, in 1984, KPC entered into a second agreement (the "Unit Power Agreement [sic]) with two AEP subsidiaries under which KPC was permitted to purchase 15%

[1] AEP raised an addition [sic] claim in its complaint which involves reimbursements from AEP subsidiaries to KPC for the cost of construction and maintenance of a [sic] extra-high voltage line. The substance of this claim is unclear from the record and, regardless, its discussion would add nothing to the resolution of the issues on appeal.

of the output from a new generating plant being built in Rockport, Indiana.

Since the Unit Power Agreement was interstate in nature it was submitted to the Federal Energy Regulatory Commission (FERC) which accepted it as a rate schedule. FERC is empowered by the Federal Power Act, 16 U.S.C. § 791 *et. seq.* (1982), to determine the justness and reasonableness of interstate power transmission rates between utilities. The Unit Power Agreement was also submitted to the Kentucky Public Service Commission, the body which reviews Kentucky intrastate electric rates. The Kentucky Commission construed the Interconnection Agreement as permitting KPC to obtain all of its power needs from the pool without resort to the Unit Power Agreement. Since power under the new agreement would cost KPC more than three times that from the pool, the Kentucky Commission ruled that the purchases from the Unit Power Agreement would be imprudent and refused to approve the retail rate increase needed to pass on the higher costs.

In reviewing the fairness of intrastate retail rates, a state commission is bound to accept a FERC determination of the reasonableness of wholesale source rates. *Narragansett Electric Co. v. Burke*, 381 A.2d 1358 (R.I. 1977), *cert. denied*, 435 U.S. 972 (1978). AEP and KCP argue that by not approving the higher retail rates the Kentucky Commission has illegally displaced or ignored the FERC approved Unit Power Agreement in violation of the Federal Power Act and the Supremacy Clause. Further, they claim that the Kentucky Commission was not permitted to construe the Interconnection Agreement because the regulation of interstate transmission is preempted by the Federal Power Act and the agreement, therefore, is subject to the sole jurisdiction of FERC. These are the claims that AEP and KPC had raised in federal court. Shortly after filing this complaint, KPC brought an action in Kentucky state court in which it appealed the Kentucky Commission's order and raised the same issues presented here. That action is still pending.

When the federal court below elected to abstain in favor of the state action and dismissed the case, the plaintiffs appealed.

II

Abstention from the exercise of legitimate federal jurisdiction should be the exception, not the rule. *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 813 (1976); *Ada-Cascade Watch Co. v. Cascade Resource Recovery, Inc.,* 720 F.2d 897, 901 (6th Cir. 1983). "Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Colorado River,* 424 U.S. at 813 (quoting *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 188-189 (1959)). It is upon this background that we consider whether abstention was proper in this case. Our review of the trial court's decision to abstain is *de novo. Traughber v. Beauchane,* 760 F.2d 673, 676 (6th Cir. 1985).

A.

AEP argues that the court's reliance on *Burford* abstention in dismissing this case was inappropriate. We agree. Abstention was called for in *Burford v. Sun Oil,* 319 U.S. 315 (1943), because the federal court had been asked to review the reasonableness of a Texas Railroad Commission order, a question of state law which implicated the state's ability to develop a comprehensive policy regarding the placement of oil wells. *Id.* at 320-22; *Colorado River,* 424 U.S. at 814-15. The need for consistent and informed decisions in this area was evidenced by the state's assignment of the review of these decisions to one state court. *Burford,* 315 U.S. at 325. Under these circumstances, review of the state law question by the federal court risked upsetting the delicate balance among oil

producers that the state was attempting to establish in the harvesting of its oil deposits. *See id.* at 327.

Similarly, in *Ada-Cascade,* this court employed *Burford* abstention when it had been asked to determine "whether [a proposed waste] facility had obtained all the necessary state and local permits" to continue construction, an issue which required the interpretation of state acts and rules established as part of a complex system of environmental regulation. 720 F.2d at 901, 905.

By contrast, the court here is not asked to review the validity under state law of the Kentucky Commission order. Nor is the court asked to decide local issues. Rather, AEP claims that the Commission is prohibited from making the order as a matter of federal law. Although we recognize the presence here of a regulatory scheme with consolidated state review, a decision on the grounds raised here will not present the same risk of disruption that was present in *Burford.*

The court below relied primarily upon the Fourth Circuit decision in *Aluminum Co. of America v. Utilities Commission of North Carolina,* 713 F.2d 1024 (4th Cir. 1983), where that court of appeals applied *Burford* to abstain from deciding Alcoa's claim that a commission order interfered with a pre-emptive federal regulatory scheme and burdened interstate commerce. *Id.* at 1025. Despite the similarity to this case, we decline to follow the *Alcoa* decision. The court there failed to recognize that *Burford* operates only to prevent federal determination of *state* law. Rather, the court abstained because the claim attacked a state order and the determination of the federal issues raised would cause "needless obstruction of North Carolina's domestic policy." *Id.* at 1029. This is an overly broad application of the doctrine. The Supreme Court has refused to employ *Burford* in a similar context noting that "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the

overturning of state policy." *Zablocki v. Redhail,* 434 U.S. 374, 379-80 n.5 (1978).

We hold that *Burford* abstention was improperly applied to this action where no questions of state law that implicate a complex state policy scheme are present.

B.

The doctrine developed in *Younger v. Harris,* 401 U.S. 37 (1971), and its progeny espouses "a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Committee v. Garden State Bar Ass'n,* 457 U.S. 423, 431 (1982). Abstention under *Younger* can be appropriate in civil cases where the state is a party as well as criminal cases when an ongoing state judicial proceeding implicates important state interests and provides an adequate opportunity to raise constitutional challenges. *Id.* at 432. When this is the case, the federal court should, absent bad faith, harassment or a patently invalid state statute, defer to certain state proceedings to consider the federal claims in the first instance. *See Colorado River,* 424 U.S. at 816.

There is little question here that the regulation of consumer electric rates is an important state interest or that KPC could raise its constitutional challenges to the Commission order in its state action. However, applying *Younger* here would be unusual in that the federal plaintiff is also, procedurally, a plaintiff in the pending state action. The typical *Younger* case involves a defendant to state initiated proceedings who prefers to raise his federal claims as a plaintiff in federal court than as a defense to the state court action. *Crawley v. Hamilton County Commissioners,* 744 F.2d 28, 30 (6th Cir. 1984). In *Crawley* state prisoners brought actions to challenge the conditions of their confinement in both state and federal court. This court

refused to apply *Younger* abstention precisely because the federal plaintiffs were also the state plaintiffs. *Id.*

Formal denominations of plaintiff and defendant should not be applied mechanically, however. In *Blue Cross & Blue Shield of Michigan v. Baerwaldt*, 726 F.2d 296, 299 (6th Cir. 1984), this court abstained under *Younger* where an insurance company raised constitutional challenges to a rate order both by bringing an action in federal court and by seeking review of the order in state court. The posture in *Blue Cross* was significantly different than that in *Crawley*. The state proceedings in *Crawley* began with a state court complaint filed by the federal plaintiff. In *Blue Cross*, and in this case, the proceedings began at the regulatory level and the subsequent court action was no more than an appeal of a state order entered against the party who appeals. *See Blue Cross*, 726 F.2d at 299. The process here was begun by the state in asserting its power to regulate intrastate commerce. When the regulatory activities of the state proceed to a state judicial forum, the principles of comity and federalism that underly the *Younger* doctrine come into play and the federal courts should abstain from interfering.

AEP does not deny that they will have an adequate opportunity to raise their federal claims in the pending state action, nor do they claim that the Kentucky Commission's orders are the result of bad faith or harassment. *See Middlesex County*, 457 U.S. at 437. Consequently we hold that the district court properly dismissed the complaint. The judgment of the court below is AFFIRMED.

CONTIE, Circuit Judge, concurring. I concur in the result and in the reasoning of the Court except for the holding that the district court improperly relied on *Burford* abstention in dismissing this case. I would hold that *Burford* abstention applies.

In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the Supreme Court held that a district court should have abstained when presented with a suit seeking review of the reasonableness

under Texas state law of a state commission's permit to drill oil wells. Abstention was appropriate because "review of reasonableness by the federal courts . . . where the State had established its own elaborate review system for dealing with the geological complexities of oil and gas fields, would have had an impermissibly disruptive effect on state policy for the management of those fields." *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 815 (1976). Accordingly, even though review of a state law question was at issue in *Burford,* the Court focused on the disruption of a state policy in applying abstention.

This Court addressed and applied *Burford* abstention in *Ada-Cascade Watch Co. v. Cascade Resource Recovery,* 720 F.2d 897 (6th Cir. 1983), where we found that the Supreme Court had established two factors which justify *Burford* abstention. "First, the presence of a complex state regulatory scheme which would be disrupted by federal court review; and, secondly, the existence of a state-created forum with specialized competence in the particular area." *Id.* at 903.

The district court below found that the considerations highlighted in *Ada-Cascade* existed in the present case. The court initially observed that the first factor was satisfied since Kentucky "has an overriding interest in regulating the retail rates charged by public utilities." The court explained that the fixing of intrastate electricity rates by the Kentucky Commission undoubtedly involved fundamental state policy considerations. Also, the court noted that the rates are set by the Kentucky Commission "in accordance with statutory procedures enacted for their formulation and execution." The court further found that the second consideration was present since the orders of the Kentucky Commission are appealed to a "designated state-created forum with special expertise in the public utility regulation field." Exclusive judicial review is provided in the

Franklin County Circuit Court by K.R.S. 278.410(1).[1] Finding the factors listed in *Ada-Cascade* to be present, the district court held that abstention under *Burford* was required.

The district court's holding is consistent with the Fourth Circuit decision in *Aluminum Company of America v. Utilities Commission of North Carolina,* 713 F.2d 1024 (4th Cir. 1983), a case which was relied upon by the district court. The appeal in *Alcoa* involved an action which had been brought in federal court by a utility company and its parent, seeking to enjoin the enforcement of a rate order issued by the state utilities commission which allegedly interfered with the FERC's regulatory scheme. State court proceedings involving, among other issues, the same federal claims raised in the federal action were pending at the time of appeal. The Fourth Circuit held:

> We believe that the present case involves the quintessential *Burford* setting of a complex state regulatory scheme concerning important facts of state policies for which impartial and fair administrative determinations subject to expeditious and adequate judicial review are afforded. The usual rule of comity must govern; the district court properly exercised its discretionary power to withhold

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[1] The statute provides in pertinent part:

> Any party to a commission proceeding or any utility affected by an order of the Commission may, within twenty (20) days after being served with the order, or within twenty (20) days after its application for rehearing has been denied by failure of the Commission to act, or within twenty (20) days after being served with the final order on rehearing, when a rehearing has been granted, bring an action against the Commission in the Franklin Circuit Court to vacate or set aside the order or determination on the ground that it is unlawful or unreasonable. Notice of the institution of such action shall be given to all parties of record before the Commission.

K.R.S. 278.410(1) (1981).

> relief so as to avoid needless obstruction of [the state's] domestic policy.

Id. at 1029.

The present case is factually indistinguishable from *Alcoa*. I would accordingly follow that court's analysis in this case and find that the present appeal "involves the quintessential *Burford* setting." Also, the conditions stated in *Ada-Cascade* are met in this case. First, there is a complex state regulatory scheme involving important state policies and second, Kentucky has provided a specialized forum to review challenges such as the one presented on appeal. Based on this court's prior discussion of *Burford* abstention and the holding of the *Alcoa* case, I would affirm the district court's application of *Burford* abstention.

DeMASCIO, District Judge, concurring. While I agree that the district court properly dismissed plaintiff's complaint, I reach that conclusion for the opposite reasons suggested in the per curiam opinion. I am convinced that the proper basis for abstention is *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and not *Younger v. Harris*, 401 U.S. 37 (1971).

In *Crawley v. Hamilton County Commissioner*, 744 F.2d 28 (6th Cir. 1984), this court circumscribed the application of the *Younger* doctrine. There, the district court dismissed, on *Younger* grounds, a § 1983 action brought by a group of jail inmates challenging the conditions of their confinement. The plaintiffs were contemporaneously pursuing a state court action on the same grounds. The circuit court reversed, holding the *Younger* doctrine inapplicable in this procedural context:

> *Younger* and its progeny all have a procedural posture which is very different from our case. In the typical *Younger* case, the federal plaintiff is a defendant in ongoing or threatened state court proceedings seeking to enjoin continuation of those state proceedings. Moreover, the basis for the federal relief claimed is generally avail-

> able to the would-be federal plaintiff as a defense in the state proceedings. In our case, the federal plaintiffs are also *plaintiffs* in the state court action. In addition, the plaintiffs are not attempting to use federal courts to shield them from state court enforcement efforts. Accordingly, there is no basis for *Younger* abstention in this case.

Id. at 30 (citations omitted).

Noting that the Kentucky Power Company appealed the Kentucky Public Service Commission's December 4, 1984 order in state court, the lower court held that the *Younger* doctrine, made applicable to civil actions by virtue of *Middlesex County Ethics Committee v. Garden State Bar Ass'n.*, 457 U.S. 423 (1982), made federal abstention proper. I disagree. The procedural posture of this case does not fit the *Younger* mold. Appellants are not attempting to enjoin state court proceedings against them, but rather they are state court plaintiffs. Further, appellants are not defensively asserting federal claims in the state court action. Therefore, the district court should not have abstained on the basis of the *Younger* doctrine and the per curiam opinion improperly affirms on that basis.

But, under the *Burford* doctrine, abstention is appropriate where federal review of a state law question would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *See Ada-Cascade Watch Co. v. Cascade Resource Recovery,* 720 F.2d 897, 903 (6th Cir. 1983).

The prerequisites for the application of *Burford* are: (a) the presence of a complex state regulatory scheme that would be disrupted by federal court review and (b) the existence of a state-created forum with specialized competence in the particular area. In *Alcoa v. Utilities Comm'n of N. Carolina,* 713 F.2d 1024 (4th Cir. 1983), the Fourth Circuit, faced with similar facts, concluded that *Burford* abstention was appropriate. The court held that the state commission's ratemaking "involved important and basic consideration of state policy and was

accomplished in accordance with the uniform statutory procedures for the formation of that policy." *Id.* at 1029.

In holding the *Burford* abstention appropriate, the district court stated:

> The Commonwealth of Kentucky clearly has an overriding interest in regulating the retail rates charged by public utilities. The Kentucky Public Service Commission orders outline the retail, intrastate rates to be charged to Kentucky electric power consumers. The setting of these rates undoubtedly involve fundamental state policy considerations and are accomplished in accordance with statutory procedures enacted for their formulation and execution. These orders are being appealed by Kentucky Power Company to a designated state-created forum with special expertise in the public utility regulation field; to wit, the Frankling [sic] County Circuit Court. Kentucky Power Company has raised both state and federal legal issues in that forum. These federal issues are the same ones the American Electric Power Co. affiliates wish this court to consider.

I agree that abstention on *Burford* grounds is appropriate in this case. The State of Kentucky certainly has a legitimate interest in the regulation of the retail rates of its public utilities. In order to effectively protect that interest the state regulatory commission has the power to scrutinize expenditures and costs that have been imprudently incurred by a utility when other less expensive means are available for the same purpose. Moreover, an extensive state appeliate system exists whereby utilities can seek review of the commission's orders. Not only does such a system exist, but appellants are taking advantage of that system while, at the same time, pursuing this action.

The district court's ruling should be affirmed because abstention based on *Burford* was proper.

No. 85-5129

United States Court of Appeals

FOR THE SIXTH CIRCUIT

AMERICAN ELECTRIC POWER CO., INC., ET AL.,
Plaintiffs-Appellants,

v.

KENTUCKY PUBLIC SERVICE COMMISSION, ET AL.,
Defendants-Appellees,

ORDER

BEFORE: **JONES** and **CONTIE**, Circuit Judges, and **DeMASCIO*** United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for hearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

JOHN HEHMAN

John P. Hehman, *Clerk*

* Hon. Robert E. DeMascio sitting by designation from the Eastern District of Michigan

No. 85-5129

United States Court of Appeals

FOR THE SIXTH CIRCUIT

AMERICAN ELECTRIC POWER COMPANY, ET AL.,
Plaintiffs-Appellants,

vs.

KENTUCKY PUBLIC SERVICE, ET AL.,
Defendants-Appellees

AIR PRODUCTS AND CHEMICAL, INC., ARMCO, INC., ET AL.,
Intervenors-Appellees

ORDER

Upon consideration of the motions of J. M. Feit, Solicitor and the appellant to publish the Court's decision of March 24, 1986,

It is ORDERED that the motions be and they are hereby denied.

ENTERED BY ORDER OF THE COURT
John P. Hehman, *Clerk*

LEONARD GREEN
Leonard Green, *Chief Deputy*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

CIVIL ACTION NO. 84-83

AMERICAN ELECTRIC POWER COMPANY, INC., ET AL — PLAINTIFFS

VS. — ORDER

KENTUCKY PUBLIC SERVICE COMMISSION, ET AL — DEFENDANTS

This matter is before the court on plaintiffs' motion for preliminary injunction and defendants' motion to dismiss for lack of subject matter jurisdiction and abstention.

FACTS

In order to meet electric power demand in Eastern Kentucky, plaintiff Kentucky Power Company entered into a Unit Power Agreement with its parent holding company, plaintiff American Electric Power Company, on August 1, 1984, whereby the parent would obtain fifty (50%) percent ownership interest in a newly-built electric power generating plant and the subsidiary would purchase, for up to 20 years, the power associated with fifteen (15%) percent of the plant. The agreement was filed with the Federal Energy Regulatory Commission as a conditional rate schedule on August 2, 1984. This action was undoubtedly taken in anticipation of defendant Kentucky Public Service Commission's refusal to approve Kentucky Power's previously filed application for a Certificate of Public Convenience and Necessity authorizing it to acquire outright 15% ownership interest in this new power generating facility. This denial was ultimately entered on August 2, 1984. The Unit Power Agreement was thereafter accepted by the Federal Energy Regulatory Commission as a rate schedule on

October 1, 1984, effective as of the commercial operation date of the new generating plant.

While the Certificate of Public Convenience and Necessity case was before the Kentucky Public Service Commission, the Kentucky Power Company filed an application for a rate increase with the Commission which sought to recoup the costs resulting from the proposed purchase of the 15% ownership interest. Following the Commission's denial of authorization of that interest, the Kentucky Power Company amended its application to include, as a valid operating expense, the cost of purchased electric power under the Unit Power Agreement from American Electric Power Company or its affiliates. Public hearings were held on October 8-11, 1984. On December 4, 1984, the Kentucky Public Service Commission issued an order which denied that part of the rate request which represented the difference between the lower costs for electric power contained in an existing Interconnection Agreement, which had been previously entered into between all American Electric Power affiliates, and the relatively higher power costs within the Unit Power Agreement. It is the operation of the Kentucky Public Service Commission's rate order, which denies to the Kentucky Power Company the full retail rate increase request, which is sought to be enjoined by the company and all of the plaintiff American Electric Power Company affiliates.

The American Electric Power Company affiliates have additionally entered into a Transmission Agreement effective April 1, 1984 for the sharing of all costs associated with their high voltage transmission facilities. This agreement constitutes a clear change of cost allocation procedure within the affiliated group and it is to be phased in over a five year period. On March 29, 1984, this Agreement was filed with the Federal Energy Regulatory Commission as a rate schedule and on August 22, 1984, the filing was accepted by that agency pending further hearings.

Kentucky Power Company is the owner of an extra high voltage transmission line that is currently under construction and which runs across Northern Kentucky. Pursuant to its order dated September 20, 1983, the Kentucky Public Service Commission conducted an investigation of this line. Hearings were held on January 10-12 and February 16, 1984. On August 3, 1984, that state agency issued an order which limited Kentucky Power Company's investment in the line, for rate-making purposes, to approximately $54 million and that all investment in excess of that amount will not be recovered from Kentucky ratepayers. The agency further ordered a five year phase-in period of this amount into the rate base. The Kentucky Power Company and the American Electric Power Company affiliates seek to likewise enjoin the operation of this rate order of the Kentucky Public Service Commission in light of the federally approved Transmission Agreement.

The Kentucky Power Company has filed suit in Franklin County Circuit Court on December 21, 1984, seeking reversal of the Kentucky Public Service Commission's orders with respect to the Unit Power Agreement and the Transmission Agreement. None of the American Electric Power Company affiliates have intervened in that action to date. The same federal legal theories which are being advanced before the state court by Kentucky Power Company to obtain revisal [sic] of the state agency's orders are likewise before this court by the affiliated group.

ISSUES

1. Pursuant to the Johnson Act, 28 U.S.C. § 1342, does this court have subject matter jurisdiction to adjudicate this controversy?

2. May this court validly utilize the *Younger* and/or *Burford* abstention doctrines to dismiss this litigation?

ANALYSIS

I. SUBJECT MATTER JURISDICTION.

Defendants contend that the Johnson Act, 28 U.S.C. § 1342, prevents this court from exercising subject matter jurisdiction over this controversy. The Johnson Act provides that:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State."

28 U.S.C. § 1342. This statute's purpose is "to prevent public utilities from going to federal district court to challenge state administrative orders or avoid state administrative and judicial proceedings." *California v. Grace Bretheren Church,* 457 U.S. 393, 409-10 n.22 (1982). *See generally,* 1A, Pt.2 Moore's *Federal Practice* ¶ 0.206 (2d ed. 1983 & 1984 Cum.Supp.). In order for the Johnson Act to deprive federal courts of subject matter jurisdiction, all four of its conditions must be satisfied. *South Central Bell Telephone Co. v. Public Service Commission of Kentucky,* 420 F.Supp. 376, 377 (E.D. Ky. 1976).

Plaintiffs contend that the Kentucky Public Service Commission has usurped powers, granted by Congress in the Federal Powers [sic] Act, 16 U.S.C. § 791, et seq., to the Federal Energy Regulatory Commission, with respect to inter-

state electric rates and transmission. The Act allegedly preempts the field and the state agency may not conduct its affairs in regulating interstate retail electric rates in a manner inconsistent with the Act. Thus, the preemption asserted herein is a statutory claim based on the Federal Power Act and does not rest solely on the Supremacy Clause of the U.S. Constitution, Article VI, cl.2.

The court holds that section (1) of the Johnson Act is not satisfied and therefore that Act does not operate to preclude an exercise of subject matter jurisdiction by this court over this controversy. Courts which have addressed the issue of whether a public utility's preemption claim is a constitutional challenge under 28 U.S.C. §1342(1) have held that, although a challenge to a rate order based on preemption may be regarded as constitutional for some purposes, it provides no basis for involving the Johnson Act to deprive the federal jurisdiction where a state agency's order is challenged as violative [sic] a specific federal statute. *Aluminum Company of America v. Utilities Commission of the State of North Carolina*, 713 F.2d 1024, 1027-28 (4th Cir. 1983); *International Brotherhood of Electrical Workers v. Public Service Commission of Nevada*, 614 F.2d 206, 209-211 (9th Cir. 1980); *New England Telephone and Telegraph Co. v. Public Utilities Comm. of Maine*, 565 F.Supp. 949, 952-53 (D. Maine 1983); *Beckenstein v. Hartford Electric Light Co.*, 479 F.Supp. 417, 420 n.1 (D. Conn. 1979). Since section (1) of §1342 has not been satisfied, the Johnson Act cannot be utilized to strip this court of jurisdiction over this matter. This court has jurisdiction under 28 U.S.C. §1331.

II. YOUNGER ABSTENTION.

As noted above, Kentucky Power Company has appealed the Kentucky Public Service Commission's final orders in the underlying rate cases to the Franklin County Circuit Court pursuant to KRS 278.410. The existence of this ongoing state proceeding strongly suggests that this court abstain under the

doctrine of *Younger v. Harris,* 401 U.S. 37 (1971), as made applicable to civil actions in *Middlesex County Ethics Committee v. Garden State Bar Ass'n.,* 457 U.S. 423 (1982).

> "The question in this case is threefold: *first,* (does the prescribed state forum to which plaintiffs are relegated) constitute an ongoing state judicial proceeding; *second,* do the proceedings implicate important state interests; and *third,* is there an adequate opportunity in the state proceedings to raise constitutional challenges."

Middlesex County Ethics Committee v. Garden State Bar Ass'n., 457 U.S. 423, 431-32 (1982). *Accord: Blue Cross and Blue Shield of Michigan v. Baerwaldt,* 726 F.2d 296, 299 (6th Cir. 1984); *Ada-Cascade Watch Co. v. Cascade Resource Recovery,* 720 F.2d 897, 902 (6th Cir. 1983).

Clearly there is an ongoing state judicial proceeding in the state courts with respect to this matter pursuant to KRS 278.410. Furthermore, the regulation of intrastate retail electric utility rates clearly involves important state interests. *Aluminum Company of America,* 713 F.2d at 1029. *See Blue Cross and Blue Shield,* 726 F.2d at 299 ("The regulation of insurance companies clearly involves important state interests."). Lastly, Kentucky statutes provide ample opportunity for Kentucky courts to review the state commission's retail ratemaking order and to adjudicate both constitutional and non-constitutional objections thereto. KRS 278.410 and 278.450. Plaintiffs have not satisfactorily demonstrated "bad faith, harassment or some other extraordinary circumstance that would make abstention inappropriate." *Blue Cross and Blue Shield,* 726 F.2d at 300, *quoting Middlesex,* 457 U.S. at 437. Therefore, this court shall abstain from considering constitutional challenges to the final retail rate orders approved by the Kentucky Public Service Commission and shall dismiss this action. *Id.*

Any interested entities, who are not parties to the state appeal, could in all likelihood intervene in the state proceedings. Ky. C.R. 24.

III. BURFORD ABSTENTION.

In addition to *Younger* abstention, *Burford*-type abstention also requires that this action be dismissed. In the decision of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the United States Supreme Court

> "upheld abstention where the 'exercise of federal review of the [state law] question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' *Colorado River Water Conservation District* [*v. United States,* 424 U.S. 800, 814 (1976)]. . . .
>
> The *Burford* abstention, however, is not appropriate 'merely because resolution of a federal question may result in the overturning of a state policy.' *Zablocki v. Redhail,* 434 U.S. 374, 380 n.5, 98 S.Ct. 673, 678 n.5, 54 L.Ed.2d 618 (1978); *Colorado River Conservation District,* 424 U.S. at 815-16, 96 S.Ct. at 1245-46. The State must exhibit an overriding interest in the subject matter. *BT Investment Managers, Inc.*[*v. Lewis,* 559 F.2d 950, 955 (5th Cir. 1977)]. Additionally, the state must centralize review in a forum with special competence. *See Nasser v. City of Homewood,* 671 F.2d 432, 440 (11th Cir. 1982). The key question is whether an erroneous federal court decision could impair the state's efforts to implement its policy. *Turf Paradise, Inc. v. Arizona Downs,* 670 F.2d 813, 820 (9th Cir.), *cert. denied,* 456 U.S. U.S. 1011, 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982); *BT Investment Managers, Inc.,* 559 F.2d at 955."

Ada Cascade, 720 F.2d at 903-4. These conditions exist here.

The Commonwealth of Kentucky clearly has an overriding interest in regulating the retail rates charged by public utilities. The Kentucky Public Service Commission orders outline the retail, intrastate rates to be charged to Kentucky electric power consumers. The setting of these rates undoubtedly involve fundamental state policy considerations and are accomplished in accordance with statutory procedures enacted for their

formulation and execution. *Aluminum Co. of America,* 713 F.2d at 1029. See KRS Chapter 278. These orders are being appealed by Kentucky Power Company to a designated state-created forum with special expertise in the public utility regulation field; to wit, the Franklin County Circuit Court. KRS 278.410(1). Kentucky Power Company has raised both state and federal legal issues in that forum. Those federal issues are the same ones the American Electric Power Co. affiliates wish this court to consider.

> "... (T)he present case involves the quintessential *Burford* setting of a complex state regulatory scheme concerning important matters of state policy for which impartial and fair administrative determinations subject to expeditious and adequate judicial review are afforded. The usual rule of comity must govern; the district court properly exercised its discretionary power to withhold relief so as to avoid needless obstruction of (Kentucky's) domestic policy."

Aluminum Company of America, 713 F.2d at 1029. *But cf., International Brotherhood of Electrical Workers,* 614 F.2d at 211-12.

The fact that a preemption claim is raised by plaintiffs does not *per se* require this court to decline to abstain. *Aluminum Company of America,* 713 F.2d at 1029. There is no clear conflict with the Federal Power Act, 16 U.S.C. § 791, et seq., by the commission's orders challenged herein. The Kentucky Public Service Commission orders

> "... (set) only retail, intrastate rates, an important matter traditionally within the sole discretion of the states, and do not directly conflict with FERC's wholesale and interstate rate setting powers. Evaluation of the preemption claim would involve detailed factfinding concerning the indirect effects of the (public service commission) order(s) on the rates established by FERC, and the contracts filed with FERC. Where, as here, circumstances are otherwise appropriate for *Burford* abstention, the federal court need not engage in such factfinding as a prerequisite to abstention."

Id at 1030.

The court considers the decision of the U.S. Court of Appeals for the Sixth Circuit in *Ada Cascade* and *Blue Cross, supra,* to require abstention in this case.

Therefore, the court being advised,

IT IS ORDERED as follows:

1. That plaintiffs' motion for preliminary injunction be, and it is, hereby DENIED;

2. That defendants' motion to dismiss be, and it is, hereby GRANTED on the basis of both *Younger* and *Burford* abstention doctrines; and

3. That the complaint herein be, and is it [sic], hereby DISMISSED, with prejudice, at the cost of the plaintiff.

This 16th day of January, 1985.

/s/ WILLIAM O. BERTELSMAN

[William O. Bertelsman] JUDGE